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No. 85-2006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OF AMICI CURIAE AMCORD, INC., *ET AL.* IN SUPPORT OF THE APPELLANTS

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are twenty-eight corporations[1] engaged in interstate commerce, including activities in the State of Washington that subject them to the Washington busi-

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[1] Amcord, Inc., Apple Computer, Inc., Brunswick Corporation, CPG Products Corporation, Darling Delaware Company, Inc., Del Monte Corporation, Delco Electronics Service Corporation, Ecko Products, Inc., Eddie Bauer, Inc., Encyclopedia Britannica, General Mills, Inc., General Mills Products Corporation, General Motors Corporation, Gifford-Hill Company, Inc., Glaco Corporation, Hewlett Packard Company, J.I. Case Company, Kellogg Sales Company, Life Savers, Inc., McNeilab, Inc., Monroe Auto Equipment Company, Nabisco, Inc., Ortho Pharmaceutical, Sandvik Special Metals Corporation, Tektronix, Inc., Triangle Pacific Corporation, U.S. Leasing Corporation, and York Manufacturing Company. This brief is filed with the consent of all parties.

ness and occupation tax at issue in this appeal. Amici are directly affected by the taxes involved here and have a direct interest in the resolution of this appeal. Like appellants, amici filed or anticipate filing actions in the Thurston County Superior Court for refunds of business and occupation taxes paid to appellee Department of Revenue, contending that the Washington tax scheme violates the Commerce Clause, U.S. Const. art. I, § 8. The present appeal involves fifty-three separate actions joined for decision by the Superior Court and consolidated for appeal to the Washington Supreme Court. As that latter court noted in its opinion upholding the Washington tax, "52 other substantially similar actions are pending in Thurston County Superior Court." App. to J.S. at A-1. Actions of amici are in addition to those actions, and the resolution of this appeal will have a direct effect on amici's refund actions.

In addition, quite apart from this particular appeal, amici have a strong interest in protecting interstate commerce from discriminatory and duplicative state taxation. Amici engage in extensive interstate commerce and are subject to a wide variety of taxes imposed by States and municipalities. This Court's disposition of the present appeal not only will affect amici directly, in light of their refund actions, but will impact on the future development of state and municipal taxation practices in a manner that will have long-term significance for interstate commerce.

SUMMARY OF ARGUMENT

To withstand Commerce Clause scrutiny, a state tax must not discriminate against interstate commerce and must be fairly apportioned. A tax that discriminates will be struck down even if fairly apportioned, and a tax that does not discriminate will nonetheless be struck down if not fairly apportioned. The Washington business and occupation tax violates the Commerce Clause

because it discriminates against interstate commerce—an issue dealt with in detail in appellants' brief. Quite apart from the evident discrimination, the tax is also invalid because it is not fairly apportioned.

Washington imposes an unapportioned tax on the full value of receipts from wholesaling or manufacturing activities in Washington. Activities by the taxpayers in other States, however, contribute to earning the receipts taxed in full by Washington. To take the clearest example from the facts of this case, if a company manufactures a product in California and sells it in Washington, the manufacturing activity in California contributes to the value of the receipts from sales in Washington. California is thus entitled to tax a portion of those receipts. Since Washington taxes the full value of the receipts, and California taxes a portion, interstate commerce is subjected to duplicative taxation in violation of the Commerce Clause. The fault is that of Washington, not the other States, because Washington does not apportion its tax.

ARGUMENT

This Court has articulated a four-part test to determine if state taxation of interstate commerce can be sustained against a Commerce Clause challenge. A tax will be upheld "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). *See Exxon Corp.* v. *Wisconsin Department of Revenue*, 447 U.S. 207, 228 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 444-445 (1979). To withstand scrutiny under the Commerce Clause, a state tax must satisfy each of these four separate requirements. For the reasons set forth in appellants' brief on the merits, the Washington

business and occupation tax is invalid because it discriminates against interstate commerce.[2]

The Washington tax scheme, however, is also invalid because it is not fairly apportioned.[3] The lack of fair apportionment is an entirely independent basis for striking down the Washington tax. This Court need only reach the issue of fair apportionment if it concludes that the Washington tax scheme does not discriminate against interstate commerce—a conclusion that would require overruling *Armco.* Thus, even in the unlikely event that this Court determines that it erred in *Armco,* the tax at issue in this appeal must nonetheless fall.

The requirement that state taxes on interstate commerce be fairly apportioned is a necessary consequence of the commingling of a Federal system of government and unitary businesses whose activities cross state lines. If a business that engages in activities in several States were subject to taxation by each State on the full value of its interstate commerce, it would bear a burden of multiple taxation that a purely local business would be spared. The imposition of such a burden solely because the activities of the business cross state lines contravenes the Commerce Clause. While "interstate commerce must bear its fair share of the state tax burden," *Washington Revenue Dept.* v. *Association of Washington Stevedoring*

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[2] *See Armco Inc.* v. *Hardesty,* 467 U.S. 638 (1984). *See generally* Brief of Amici Curiae Amcord, Inc., *et al.* in Support of the Jurisdictional Statement, *National Can Corp.* v. *State of Washington,* No. 85-2006. The fact that the Washington tax discriminates against interstate commerce suffices to render it invalid under the Commerce Clause, regardless of whether the tax satisfies the other three components of the *Complete Auto* test. *See Westinghouse Electric Corp.* v. *Tully,* 466 U.S. 388 (1984) (fairly apportioned tax struck down as discriminatory).

[3] In their Jurisdictional Statement, appellants challenged the Washington tax on both discrimination and apportionment grounds. *See* J.S. at 7 n.3.

Cos., 435 U.S. 734, 750 (1978), it cannot be forced to bear more than its fair share through multiple taxation.

This Court reviewed the basis of the apportionment requirement in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 446-447 (citations omitted):

> It is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause. In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value. The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full.

The Washington business and occupation tax "is unapportioned," *General Motors Corp.* v. *Washington*, 377 U.S. 436, 448 (1964), and represents an effort by Washington to tax the full value of interstate commerce.[4]

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[4] The majority in *General Motors* held that the Washington tax did not violate the Due Process Clause, but refrained from passing on the Commerce Clause issues presently before this Court. 377 U.S. at 448-449. The majority's comments on apportionment concerned "whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation," *id.* at 440—concerns that are directed to the Due Process Clause or the fourth prong of the *Complete Auto* test, whether the tax "is fairly related to the services provided by the State." 430 U.S. at 279. *See Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. at 441 (citing *General Motors* for "due process requirements for apportionability"). The majority expressly did not consider any claim of "multiple taxation," 377 U.S. at 448, the concern of the fair apportionment prong of the *Complete Auto* test. The four dissenters in *General Motors* did reach the Commerce Clause claim of multiple taxation, and would have held the tax at issue on this appeal invalid because it was not fairly apportioned. *See* 377 U.S. at 450-451 (Brennan, J., dissenting); *id.* at 458 (Goldberg, J., dissenting, joined by Stewart and White, JJ.).

Washington imposes its gross receipts tax on 100% of the receipts from sales in Washington or on 100% of the receipts from manufacturing in Washington. Other States, however, are free to impose taxes on a portion of those same receipts, as a result of activities in those States that contribute to the receipts. The record in this case demonstrates that other States in fact do so.[5]

For example, appellant National Can Corporation manufactures products in California and sells them in Washington. California imposes an income tax on National Can, based on National Can's gross receipts (including gross receipts from sales in Washington), less certain deductions, multiplied by an apportionment factor. *See* App. to J.S. at I-4. In short, receipts from sales in Washington are taken into account by California in taxing National Can. California is free to do this because the manufacturing activity of National Can *in California* contributes, in part, to realizing the receipts from sales in Washington. Since California apportions its tax, it does not take more than its fair share from sales in Washington, but it does take its fair share.

Washington, however, taxes 100% of the receipts from sales in Washington, with no apportionment. Since Washington taxes all of the receipts, and California taxes a portion, it is clear that National Can is subject to taxation on more than 100% of its receipts from Washington. This is because Washington violates the "corollary of the apportionment principle * * * that no jurisdiction

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[5] It was stipulated below that appellants subject to the Washington manufacturing tax pay taxes to other jurisdictions based on sales in those jurisdictions of products manufactured in Washington. *See* App. to J.S. at H-2 - H-3, I-3. It was also stipulated that appellants subject to the Washington wholesaling tax pay taxes to other jurisdictions based on the manufacture in those jurisdictions of products sold in Washington. *See id.* at I-[illegible], J-3.

may tax the instrumentality in full." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 447.

To take the converse example, appellant Kalama Chemical, Inc., manufactures products in Washington and sells them in Illinois. Illinois imposes an income tax on Kalama, based on Kalama's gross receipts from sales, less certain deductions, multiplied by an apportionment factor. *See* App. to J.S. at H-2. Washington, however, taxes 100% of the gross receipts Kalama realizes from manufacturing in Washington. When Kalama sells in Illinois a product manufactured in Washington, Washington taxes 100% of the receipts and Illinois taxes a portion of them. As with National Can, Kalama faces a burden of multiple taxation because Washington taxes the full value of commerce attributable to more than one State.[6]

The Washington Department of Revenue argues, however, that the tax is effectively apportioned by "allocation." As the court below described the State's argument, the tax is fairly apportioned because "the tax is applied only to the value of products manufactured in Washington or to the gross proceeds of sales in Washington." App. to J.S. at A-14. The foregoing examples, however, prove—on the basis of stipulated facts—that allocation does not effectively apportion the tax to avoid multiple taxation. And this Court's recent opinions dem-

[6] The foregoing examples correspond to the actual facts stipulated by the parties. The danger of multiple taxation inherent in Washington's tax scheme is also vividly demonstrated by application of the "internal consistency" test. *See Armco Inc.* v. *Hardesty*, 467 U.S. at 644; *Container Corp. of America* v. *Franchise Tax Board*, 463 U.S. 159, 169 (1983). That test considers the effect on commerce if the subject tax were applied by every jurisdiction. In this case, applying the internal consistency test, the State in which a product is manufactured and the State in which it is sold would each tax 100% of the gross receipts realized from the manufacture and sale of that product, resulting in clear multiple taxation.

onstrate that allocation is not an acceptable means of apportioning a tax on interstate commerce.[7]

In *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. at 444, this Court recognized that "[t]axation by apportionment and taxation by allocation to a single situs are theoretically incommensurate * * * ." To permit taxation by allocation, the Court would be required as a matter of both law and logic to hold that other States could not include income allocated to a particular State in calculating their own income tax, no matter how carefully the tax was apportioned. Thus, California could not include income from National Can's sales in Washington in calculating National Can's income tax, even though California apportions the tax so as to reach only its fair share of income from Washington sales. Similarly, Illinois could not include income from sales *in Illinois* of Kalama's products manufactured in Washington in calculating Kalama's income tax, because the receipts from those sales would be allocated to Washington, which taxes the manufacture of the products.

This Court's opinions not only recognize the incompatibility of allocation and apportionment, *see id.*, but also express a clear preference for apportionment. In

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[7] The fact that Washington's tax is a gross receipts tax rather than an income tax has no significance for Commerce Clause purposes. *See, e.g., Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 280-281 (1978); *id.* at 281 (Brennan, J., dissenting); *Armco Inc.* v. *Hardesty*, 467 U.S. at 644. This Court has not restricted its fair apportionment analysis to state income taxes. *See, e.g., J.D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938) (gross receipts tax); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434, 438-439 (1939) (gross receipts tax); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 444-447 (property tax). Any failure to apply the fair apportionment requirement to gross receipts taxes, while applying it to income taxes, would of course be an open invitation to States desirous of taxing more than their fair share of interstate commerce to shift from an apportioned net income tax to an unapportioned gross receipts tax.

Mobil Oil, for example, the Court considered an apportioned Vermont income tax. Vermont sought to reach its apportioned share of dividend income received by the taxpayer, a New York corporation, from foreign affiliates and subsidiaries. The taxpayer argued that the dividends could not be included in the income subject to apportionment, but must be *allocated* to New York, under the traditional rule that dividends are fully taxable at the commercial domicile or business situs. *See id.* at 436, 443-444. The Court disagreed, and upheld the Vermont tax:

> [W]e may assume * * * that the State of commercial domicile has the authority to lay some tax on * * * dividend income * * * . But there is no reason in theory why that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States. *These are the circumstances in which apportionment is ordinarily the accepted method.* [*Id.* at 445-446 (emphasis supplied).]

Here too when a unitary business gains receipts from sales in Washington, those receipts reflect value from activities in other States, including, for example, the State in which the product was manufactured. All of the receipts should therefore not be allocated to Washington for taxation. Rather, "[t]hese are the circumstances in which apportionment is ordinarily the accepted method." *Id.* at 446.

Similarly, in *Exxon Corp.* v. *Wisconsin Department of Revenue, supra,* Wisconsin sought to include in its apportioned income tax income from the taxpayer's oil exploration and production activities. Although the taxpayer sold its products in Wisconsin, it engaged in no exploration or production activities there. The taxpayer argued that its income from exploration and production

should not be subject to apportionment but must be allocated to the situs State. 447 U.S. at 227. This Court disagreed, holding that "[t]he geographic location of * * * raw materials does not alter the fact that [income from exploration and production] is part of the unitary business of the interstate enterprise and is subject to fair apportionment among all States to which there is a sufficient nexus with the interstate activities of the business." *Id.* at 230.

So too here the "geographic location" of manufacturing or of sales does not alter the fact that income from manufacturing or sales is part of the unitary business, and is subject to apportionment. Washington, however, seeks to allocate all of the receipts from manufacturing in Washington to itself, and all of the receipts from sales in Washington to itself, solely because one of these events —manufacturing or wholesaling—occurred in Washington. The teaching of *Mobil Oil* and *Exxon* is that when activities in other States contribute to the earning of the receipts, those States may tax their fair share by apportionment, and allocation is not appropriate.[8]

The danger of multiple taxation of interstate commerce is inherent in the Washington tax scheme. Apportionment by allocation to the State where a particular event occurred avoids multiple taxation only if every State that imposes a tax bases it on the same event. If every State taxed only wholesaling, and receipts were allocated to the State in which the wholesaling occurred, there would be no multiple taxation. Indeed, if Washington imposed only a wholesaling tax, it could credibly press its allocation argument and contend that any multiple taxation was no more its fault than the fault of

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[8] *See* Hellerstein, *State Income Taxation of Multijurisdictional Corporations: Reflections on* Mobil, Exxon *and H.R. 5076*, 79 Mich. L. Rev. 113, 152-153 (1980); *The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 75, 122 (1980).

other States.[9] Washington, however, imposes its tax on interstate commerce on the basis of wholesaling or manufacturing—whichever occurs in Washington. Washington can hardly argue that the power to tax should be allocated to the wholesaling situs when it taxes manufacturing if the wholesaling occurs outside its borders. Washington's allocation "principle" thus amounts to nothing more than an assertion that the power to tax should be allocated to Washington.[10]

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[9] *See Armco Inc.* v. *Hardesty*, 467 U.S. at 645. In *Moorman Mfg. Co.* v. *Bair*, *supra*, the Court upheld an Iowa income tax that was apportioned by a single-factor sales formula. The Court emphasized, however, that the record before it "does not establish the essential factual predicate for a claim of duplicative taxation." *Id.* at 276. In a subsequent case the Court expressly rejected an argument based on *Moorman* when the record *did* demonstrate multiple taxation. *See Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 455. Here the parties have stipulated that appellants are subject to taxes in other States based in part on receipts that are taxed in full by Washington, *see* App. to J.S. at H-2 - H-3, I-3 - I-4, J-3, and accordingly "the essential factual predicate for a claim of duplicative taxation" is clearly established. In addition, the tax at issue in *Moorman*—unlike the Washington tax scheme—satisfied the "internal consistency" test.

[10] The State relies upon the statement in *Standard Pressed Steel Co.* v. *Department of Revenue*, 419 U.S. 560, 564 (1975), that the Washington tax is "apportioned exactly to the activities taxed." Motion to Dismiss or Affirm at 23. What the Court said in full, however, was that the tax is " 'apportioned exactly to the activities taxed,' all of which are intrastate." 419 U.S. at 564 (quoting *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. at 440). Here it is stipulated that appellants' activities outside Washington contribute to the value of the receipts taxed in full by Washington. *See* App. to J.S. at H-1 - H-2, I-2, J-2. In any event, *Standard Pressed Steel* was primarily concerned with nexus rather than multiple taxation issues, and its comments concerning apportionment were not addressed to the question of multiple taxation. The Court did not pause long on that question, because the taxpayer did not make "any effort" to show that it faced multiple taxation. 419 U.S. at 563. As previously noted, the stipulations in this case establish multiple taxation as a fact.

The court below appeared to base its conclusion that the tax was fairly apportioned on the ground that "Washington does not tax the income of a unitary business, but rather taxes only the privilege of manufacturing or selling within the state." App. to J.S. at A-14. The court apparently viewed manufacturing and wholesaling as two separate businesses, and saw no problem with Washington taxing 100% of the receipts from whichever activity occurred in Washington. National Can, however, which is subject to the Washington wholesaling tax, is not simply in the business of selling. It manufactures the products it sells, and that manufacturing activity in California helps earn the receipts taxed in full by Washington. Similarly Kalama, which is subject to the Washington manufacturing tax, is not simply a manufacturer but also markets the products it manufactures, and its sales activity in Illinois helps earn the manufacturing receipts taxed in full by Washington.

This Court has long recognized that when "the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business," it is not appropriate for one State to tax the entire income "regardless of the extent to which it may be derived from the conduct of the enterprise in another State." *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123, 133 (1931). The parties have stipulated in this case that appellants engage in activities in other States that contribute to the value of products manufactured or sold in Washington. *See* App. to J.S. at H-1 - H-2, I-2, J-2. The most telling argument against the "separate business" view of the court below, however, is the Washington tax itself. That tax is imposed on manufacturing in Washington and wholesaling in Washington, but provides an exemption from the manufacturing tax for any business that pays the wholesaling tax. Wash. Rev. Code § 82.04.440. The State itself thus recognizes that

manufacturing and wholesaling are not separate businesses but parts of a single enterprise.[11]

Almost fifty years ago this Court struck down a state tax because it "includes in its measure, without apportionment, receipts derived from activities in interstate commerce." *J.D. Adams Mfg. Co.* v. *Storen*, 304 U.S. at 311. *See Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. at 438-439. The Washington gross receipts tax includes in its measure all the receipts from manufacturing or wholesaling in Washington, even though those receipts are earned, in part, by the taxpayers' activities outside Washington. Since the States in which these activities occur may tax a portion of the receipts, Washington may not tax them all. "The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 447. In attempting to do so, the Washington tax imposes multiple and duplicative taxation on interstate commerce.

The inevitable consequence of this duplicative taxation is that business will be encouraged to avoid interstate commerce and perform as many activities as possible in Washington. "It is only the interstate context of the company's business which causes it to pay a tax measured by gross receipts more than once in the chain of production and distribution." Special Subcomm. on State Taxation, *supra* at 1060. Washington's unapportioned tax is thus an effort "to tax an in-state operation as a means of 'requiring [other] business operations to be performed in the home State.'" *Boston Stock Ex-*

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[11] *See* Special Subcomm. on State Taxation of the House Comm. on the Judiciary, *State Taxation of Interstate Commerce*, H.R. Rep. No. 565, 89th Cong., 1st Sess. at 1059 (1965) ("if indeed a production tax and a selling tax are different taxes when applied to manufacturers, then in those States imposing them one would expect a manufacturer to be taxed twice, once under the production levy and again under the selling levy. Such is not the case").

change v. *State Tax Comm'n*, 429 U.S. 318, 336 (1977) (quoting *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)). If Washington can use duplicative taxation to skew the competition with its neighbors for business, however, its neighbors can retaliate in kind. The end result would be "the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland* v. *Louisiana*, 451 U.S. 725, 754 (1981). Washington cannot arrogate to itself the right to tax the full value of receipts earned in several States. Each State is entitled to tax no more than its fairly apportioned share.

CONCLUSION

For the foregoing reasons, and those in the Brief of Appellants, this Court should reverse the decision below.

Respectfully submitted,

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